

U.S. Department of Labor

**Board of Alien Labor Certification Appeals
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Date: September 25, 1998

Case No: 97 INA 278

In the Matter of:

CYNTHIA GREEN, Employer,

on behalf of

ELMER YUMOL DORMIDO, Alien

Appearance: Joel Stewart, Esq., of Fort Lauderdale, Florida

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from an Application for Alien Employment Certification filed on behalf of **ELMER YUMOL DORMIDO** (Alien) by **CYNTHIA GREEN**, (Employer) under § 212(a) (5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer (CO) of the U.S. Department of Labor at Atlanta, Georgia, denied the application, and the Employer requested review pursuant to 20 CFR § 656.26.¹

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available at that time and place; and (2) the employment of the alien will not adversely affect the wages

1. The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

and working conditions of United States workers similarly employed.²

STATEMENT OF THE CASE

On July 1, 1995, the Employer applied for Alien Employment Certification on behalf of the Alien for employment as a Butler.³ The application (Form ETA 750A) described the Job Duties of the position as follows:

Coordinate activities of household, including cleaning and related duties. Help serve lunch and dinner. Set table and serve meals. Mix and serve cocktails and tea. Take messages from telephone. Announce guests. Arrange for household services to care for interior and exterior of house.

AF 52.

Notice of Findings. On January 6, 1997, the Certifying Officer (CO) issued a Notice of Findings (NOF) denying this Application for Alien Employment Certification, subject to rebuttal.

The CO said that the employer's job is not *bona fide* and has been "mistitled" and "miscoded." Although the Employer requires a Butler, the duties that have been listed in Item 13 are not appropriate. A Butler, as described in the DOT does not serve lunch or dinner. A Butler, said the CO, supervises and coordinates the activities of the household employees engaged in cooking, cleaning, and related domestic duties, based on the description of the work of this occupation in the DOT. The CO said further that the Employer did not appear to have any other household workers, and so concluded that it did not appear that the Employer would require the services of a Butler, as that job is described by the DOT. Construing DOT Occupational Code No. 301.474-010,⁴ the CO said the rebuttal evidence should include photographs,

2. Administrative notice is taken of the Dictionary of Occupational Titles, ("DOT") published by the Employment and Training Administration of the U. S. Department of Labor.

3. The position described by the Employer was classified under DOT Code No. **309.137-010 BUTLER** (domestic ser.) Supervises and coordinates activities of household employees engaged in cooking, cleaning, and related domestic duties: Oversees serving of luncheon and dinner, sets table, directs workers in serving meals, or personally serves them. Performs other services as requested, such as mixing and serving cocktails and tea. Answers telephone and delivers messages. Receives and announces guests. May prepare salads. May keep silver service clean and intact. May employ and discharge other household employees. GOE: 09.01.03 STRENGTH: L GED: R4 M2 L3 SVP: 6 DLU: 77

4. **301.474-010 HOUSE WORKER, GENERAL** (domestic ser.) alternate titles: housekeeper, home Performs any combination of following duties to maintain private home clean and orderly, to cook and serve meals, and to render personal services to family members: Plans meals and purchases foodstuffs and household supplies. Prepares and cooks vegetables, meats, and other foods according to employer's instructions or following own methods. Serves meals and refreshments. Washes dishes and cleans silverware. Oversees activities of children, assisting them in dressing and bathing. Cleans furnishings, floors, and windows, using vacuum cleaner, mops, broom, cloths, and cleaning solutions. Changes linens and makes beds. Washes linens and other garments by hand or machine, and mends and irons clothing, linens, and other household articles, using hand iron or electric ironer. Answers telephone and doorbell. Feeds pets. GOE: 05.12.18 STRENGTH: M GED: R3 M2 L2 SVP: 3 DLU: 86

Federal Income Tax Returns, a list of household employees, and other relevant information to prove that Employer requires a Butler and not a "House Worker, General."

Rebuttal. The Employer's rebuttal consisted of photographs, a 1995 Federal Income Tax Return, and a letter responding to the CO's reasons for rejecting this application. In addition, the Employer argued that, "The NOF did not include Part A or B to make corrections or changes. However, the response appears to address the issues in the NOF. ... If the CO believes that the Employer [sic] to make corrections or correct further deficiencies, we respectfully request that you return Part A&B along with further instructions regarding changes needed and recruitment instructions." (Quoted verbatim without change or correction.)

Final Determination. The CO denied certification in a Final Determination denying certification of February 18, 1997. The CO said the Employer failed to provide sufficient documentary evidence to rebut the NOF defects. The CO explained that, "The rebuttal states that there are no household employees and that the Butler will arrange for contract workers to maintain the residence." The CO remained convinced that this job opportunity is for a "Household Worker, General" and not a "Butler" and concluded that the Employer failed to prove that a *bona fide* job for a Butler exists.

Appeal. After the CO denied Employer's February 21, 1997, Motion to Reconsider, the Employer requested review by BALCA on April 10, 1997.

DISCUSSION

The issue turns on the CO's interpretation of DOT descriptions of the duties of a Butler and a General House Worker, as set out in the footnotes, *supra*. The question is reduced to whether or not the supervisory component of the work is critical to the definition of this job. Both the DOT and the Employer's application clearly indicated that (1) the Butler is the senior member of the household staff and (2) the Butler's functions are primarily supervisory. Thus, it is reasonable that the CO inferred that a supervisor's job could not exist unless there was someone to supervise, since the CO rejected the rebuttal and application because this Butler does not supervise any other household employees and his duties require him to arrange for "contract workers" to maintain the Employer's residence.

The panel does not accept the CO's assumption that no job exists on the basis of the evidence of record at this time, even though the position Employer has offered minimized the supervisory duties and virtually omitted this important component of the DOT description, for which see footnote No. 3, *supra*. Under the DOT description, the Butler supervises and coordinates the activities of others, and oversees and directs the staff serving meals, but sets the table. "As requested," the Butler performs such other services as mixing and serving cocktails and tea. Also, the Butler may personally serve the meals, answer the telephone and deliver messages, receive and announce guests, prepare salads, "keep silver service clean and intact," and employ and discharge other household employees.

On the other hand, a comparison of the DOT description with the Job Duties in Form 750A leaves the impression that the services this Employer requires cannot be established as a *bona fide* job unless more

evidence is offered.⁵ While the supervisory component is dominant, the CO must determine whether the Job Duties in this application exclude the possibility that the Butler might be the only member of the household staff and whether a combination of duties within the meaning of 20 CFR § 656.21(b)(2)(ii) is at issue in this case.⁶

Accordingly, the following order will enter.

ORDER

The Application for Alien Labor Certification is hereby Remanded to the Certifying Officer for additional proceedings consistent with the foregoing decision and to permit the Certifying Officer to issue a Second Notice of Finding with appropriate rebuttal directions, subject to Employer's continuing burden of proof.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

5. It is well established that the NOF must be adequate to provide the employer an opportunity to rebut or cure the defects. **Downey Orthopedic Medical Group**, 87 INA 674 (Mar. 16, 1988)(*en banc*).

6. See **H. Stern Jewelers, Inc.**, 88 INA 421 (May 23, 1990).

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.